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IN THE  
Supreme Court of the United States  
OCTOBER TERM, 1978

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No. 78-1741

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STATE OF ALABAMA,

Petitioner,

versus

RICHARD ZUCK,

Respondent.

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BRIEF IN OPPOSITION TO PETITION  
FOR A WRIT OF CERTIORARI TO THE  
UNITED STATES COURT OF APPEALS  
FOR THE FIFTH CIRCUIT

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OPINION BELOW

The opinion of the Court of Appeals, attached in the  
appendix of Petition for Writ of Certiorari, was filed by  
petitioner.

## QUESTION PRESENTED

1. Whether this Honorable Court should review a holding by the Fifth Circuit Court of Appeals that an inherent conflict of interest situation existed based on the following:

1. Retained law firm as counsel to petitioner in murder trial also represented State Prosecutor in unrelated civil matter.
2. The State Judge, the Prosecutor, and Respondent's attorneys knew of this dual representation, none of them informed Respondent of it.

## STATEMENT OF THE CASE

Respondent accepts petitioner's statement of the case as being substantially correct.

## ARGUMENT AGAINST GRANTING WRIT

Petitioner's first argument is the effect of the decision of the Fifth Circuit Court of Appeals will be to diminish the prosecutor's freedom to employ counsel of choice. Respondent contends the effect does not in any manner infringe on the important area of free choice but simply means the attorney representing an adverse party must disclose such fact so that the accused can choose the proper course under the circumstances.

We live in a day in which many have witnessed eroding confidence in the legal profession. Our system of criminal justice should guarantee that an accused charged with a felony should be entitled to have complete and unreserved confidence in his advocate as opposed to the interests of the prosecutor or the state; and if there is some connection between his advocate and the prosecutor or state, however slight or of whatever nature, he should be given the benefit of knowing the nature of that relationship so that he can make an independent judgment on what course he should follow under the circumstances. In essence, an accused should not be placed in a position where his advocate could in any manner be subject to or influenced by the one whose duty is to present evidence to a jury and request a conviction, the result of which may be incarceration in the state penal system, or death. Ultimately, by requiring full disclosure, the foundation of the legal profession and the criminal justice system will be strengthened.

The second argument made by petitioner is that an accused has the burden of showing prejudice, even assuming his advocate is engaged in a conflict of interest. In response to this argument, the Respondent points out the long established principle enunciated in many federal cases, cited in *Zuck v. Alabama*, 78-2095, January 24, 1979, which holds the issue of prejudice is relevant in an inherent conflict of interest situation. This position was very adequately summarized by the Court in the case of *Castillo v. Estelle*, 504 F2d 1243 (1974), as follows:

"Where there is a conflict of interest such as exists in this case, the prejudice may be subtle, even unconscious. It may elude defection on review. A reviewing court deals with a cold record, incapable, perhaps, of exposing gross instances of incompetence but often giving no clue to the erosion of zeal which may ensue from divided loyalty. Accordingly, therefore, where the conflict is real, as it is here, a denial of the right to effective representation exists, without a showing of specific prejudice."

These decisions are based on sound reason since it is impossible to penetrate the mind of any human being to determine what motive prompted him to act or react in a certain situation; to cast the burden upon an accused to show prejudice or improper motive when the conflict is inherent as in this case would amount to an intolerable burden and incapable of proof. As stated by the court in *Castillo v. Estelle*, Supra,

"We do not ascribe to the attorney nor the judge improper motives, but they are chargeable with an error of judgment fatal to a fair trial."

Also, as stated by the Court in *U.S. v. Meyers*, 253 Fed. Supp. 55 (1966),

"We hasten to add that we are not ascribing to the attorney involved in anything but the highest motives nor are we saying that the defendant was necessarily prejudiced. We do say, however, that it was certainly an error of

judgment not to have informed the accused of these other clients so that he would have had an opportunity to decide whether he wanted to continue to retain him under the circumstances."

In summary, Respondent contends the decision of the Court reaffirms the importance of providing adequate constitutional safeguards to the rights of the accused in a criminal proceeding. Respondent's advocate at the time of trial had divided loyalties; it is generally recognized that a prosecutor is an advocate, therefore, an adverse party whose interest is opposed to the interest of the accused, *Coolidge v. New Hampshire*, 91 S. Ct. 2022, 403 U.S. 443 (1971) and *Redmon v. State*, 47 Al. App. 421 (1971).

## CONCLUSION

For these reasons the Writ for Certiorari should be denied.

Respectfully Submitted,

HUBERT L. TAYLOR and  
EDWARD CUNNINGHAM  
ATTORNEYS FOR  
RESPONDENT

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**AFFIDAVIT OF PROOF OF SERVICE**

State of Alabama

Etowah County

I, the undersigned, Hubert L. Taylor, 827 Chestnut Street, Gadsden, Alabama 35901, hereby certify that I have deposited for service three (3) printed copies of a Brief in Opposition to Petition for a Writ of Certiorari to the United States Court of Appeals for the Fifth Circuit to Walter S. Turner, Chief Assistant Attorney General, 64 N. Union, Montgomery, Alabama 36130, and forty printed copies to the Clerk of the Supreme Court of the United States.

This the \_\_\_\_ day of June, 1979.

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HUBERT L. TAYLOR  
ATTORNEY FOR RESPON-  
DENT

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